No. 18-18

IN THE
Supreme Court of the United States

MARYLAND-NATIONAL CAPITAL PARK AND PLANNING COMMISSION,
Petitioner,

v.

AMERICAN HUMANIST ASSOCIATION, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF FOR PETITIONER MARYLAND-NATIONAL CAPITAL PARK AND PLANNING COMMISSION

ADRIAN R. GARDNER
WILLIAM C. DICKERSON
TRACEY A. HARVIN
MARYLAND-NATIONAL CAPITAL PARK AND PLANNING COMMISSION
6611 Kenilworth Ave., Suite 200
Riverdale, MD 20737

NEAL KUMAR KATYAL
Counsel of Record
MITCHELL P. REICH
BENJAMIN A. FIELD
HOGAN LOVELLS US LLP
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5600
neal.katyal@hoganlovells.com

Counsel for Petitioner Maryland-National Capital Park and Planning Commission

QUESTION PRESENTED

Whether the Establishment Clause requires the removal or destruction of a 93-year-old memorial to American servicemen who died in World War I solely because the memorial bears the shape of a cross.

PARTIES TO THE PROCEEDING

The Maryland-National Capital Park and Planning Commission, petitioner on review in No. 18-18, was the defendant-appellee below.

The American Legion, The American Legion Department of Maryland, and The American Legion Colmar Manor Post 131, respondents on review in No. 18-18 and petitioners on review in No. 17-1717, intervened as defendants in the District Court and were defendants-appellees in the Court of Appeals.

The American Humanist Association, Steven Lowe, Fred Edwords, and Bishop McNeill, respondents on review, were the plaintiffs-appellants below.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF AUTHORITIES v

INTRODUCTION 1

OPINIONS BELOW 3

JURISDICTION 3

CONSTITUTIONAL PROVISIONS INVOLVED 3

STATEMENT 4

A. Historical Background 4

B. Factual Background 9

C. Procedural History 13

SUMMARY OF ARGUMENT 19

ARGUMENT 23

THE PEACE CROSS DOES NOT VIOLATE THE ESTABLISHMENT CLAUSE 23

A. A Government Display That Uses Religious Symbolism Is Constitutional If Its Purpose And Objective Meaning Are Secular Or If It Comports With The Nation's History And Traditions 23

B. The Peace Cross Is Constitutional 33

1. The purpose and objective meaning of the Peace Cross are secular 34

TABLE OF CONTENTS—Continued

Page

2. *The Peace Cross fits in a long history and tradition of displaying crosses as symbols of sacrifice and military valor* 44

C. The Peace Cross Is Also Constitutional Under The *Lemon* Test 54

CONCLUSION 59

TABLE OF AUTHORITIES

Page(s)

CASES:

Am. Atheists, Inc. v. *Davenport*,
637 F.3d 1095 (10th Cir. 2010) 17, 40

Am Atheists, Inc. v. *Port Auth. of N.Y. & N.J.*,
760 F.3d 227 (2d Cir. 2014) 42

Buono v. *Norton*,
371 F.3d 543 (9th Cir. 2004) 15

Capitol Square Review and Advisory Bd. v. *Pinette*, 515 U.S. 753 (1995) ..... *passim*

Cty. of Allegheny v. *ACLU*,
492 U.S. 573 (1989) ..... *passim*

Elk Grove Unified Sch. Dist. v. *Newdow*,
542 U.S. 1 (2004) 24, 33, 57

Engel v. *Vitale*,
370 U.S. 421 (1962) 24

Kondrat'yev v. *City of Pensacola*,
903 F.3d 1169 (11th Cir. 2018), *petition for cert. docketed*, No. 18-351 (U.S. Sept. 18, 2018) 47

Lambeth v. *Bd. of Comm'rs of Davidson Cty.*,
407 F.3d 266 (4th Cir. 2005) 17

Larson v. *Valente*,
456 U.S. 228 (1982) 23

Lemon v. *Kurtzman*,
403 U.S. 602 (1971) ..... *passim*

Lynch v. *Donnelly*,
465 U.S. 668 (1984) ..... *passim*

TABLE OF AUTHORITIES—Continued

Page(s)

Marsh v. *Chambers*,
463 U.S. 783 (1983) 32, 33, 49

McCreary Cty. v. *ACLU*,
545 U.S. 844 (2005) 26, 27, 28

Mueller v. *Allen*,
463 U.S. 388 (1983) 58

Newdow v. *Roberts*,
603 F.3d 1002 (D.C. Cir. 2010) 33

People of State of Ill. ex rel. McCollum v. *Bd. of Educ. of Sch. Dist. No. 71, Champaign Cty.*,
333 U.S. 203 (1948) 24

Pleasant Grove City v. *Summum*,
555 U.S. 460 (2009) 29, 36, 39

Salazar v. *Buono*,
559 U.S. 700 (2010) ..... *passim*

Santa Fe Indep. Sch. Dist. v. *Doe*,
530 U.S. 290 (2000) 58

Sch. Dist. of Abington Twp. v. *Schempp*,
374 U.S. 203 (1963) 25

Suhre v. *Haywood Cty.*,
131 F.3d 1083 (4th Cir. 1997) 15

Town of Greece v. *Galloway*,
572 U.S. 565 (2014) ..... *passim*

Trunk v. *City of San Diego*,
629 F.3d 1099 (9th Cir. 2011) 17

Trunk v. *City of San Diego*,
660 F.3d 1091 (9th Cir. 2011) 47

TABLE OF AUTHORITIES—Continued

Page(s)

Van Orden v. *Perry*,
545 U.S. 677 (2005) ..... *passim*

Walz v. *Tax Comm'n of City of New York*,
397 U.S. 664 (1970) 23

Zelman v. *Simmons-Harris*,
536 U.S. 639 (2002) 55, 56, 57

STATUTES:

28 U.S.C. § 1254(1) 3

Consolidated Appropriations Act, 2005, Pub. L. No. 108–447, div. J, tit. I, § 116(a), 118 Stat. 2809, 3346 ..... 35, 49

Department of Defense Appropriations Act, 2002, Pub. L. No. 107–117, div. A, tit. VIII, § 8137(a), 115 Stat. 2230, 2278 ..... 8, 35, 49

Md. Code Ann., Land Use § 15-101 13

Preservation of Mt. Soledad Veterans Memorial, Pub. L. No. 109-272, 120 Stat. 770 (2006) 49

CONSTITUTIONAL PROVISIONS:

U.S. Const. amend. I ..... *passim*

U.S. Const. amend. XIV 3

LEGISLATIVE MATERIAL:

H.R. Res. 16, 68th Cong. (1924) 6, 35

S. J. Res. 243, 75th Cong. (1938) 45

TABLE OF AUTHORITIES—Continued

Page(s)

OTHER AUTHORITIES:

28th Infantry Division National Shrine & Monuments, Pennsylvania Military Museum, https://www.pamilmuseum.org/the-monuments-shrine/ (last visited Dec. 16, 2018) 8

Am. Battle Monuments Comm'n, St. Mihiel American Cemetery and Memorial, *available at* https://www.abmc.gov/sites/default/files/publications/St.Mihiel_Booklet.pdf (last visited Dec. 16, 2018) 7

Argonne Cross (WW I), Arlington Nat'l Cemetery, https://www.arlingtoncemetery.mil/Explore/Monuments-and-Memorials/Argonne-Cross (last visited Dec. 16, 2018) 7

Lori Renée Aument, Experimentation in Concrete: John J. Earley at Meridian Hill Park, Washington, DC: History, Technology, and Characterization of Exposed Aggregate Concrete (1999) (unpublished M.S. thesis, University of Pennsylvania), *available at* https://repository.upenn.edu/cgi/viewcontent.cgi?article=1348&context=hp_theses 42

Authority of the Department of the Interior to Provide Historic Preservation Grants to Historic Religious Properties Such as the Old North Church, 27 Op. O.L.C. 91 (2003) 43

TABLE OF AUTHORITIES—Continued

Page(s)

George Willard Benson, The Cross: Its History and Symbolism (1934) 45

Thor Borresen, *Father Millet Cross: America's Smallest National Monument*, 3 Regional Rev. 1 (1939), *available at* https://web.archive.org/web/20080726175911/http://www.nps.gov/history/history/online_books/regional_review/vol3-1e.htm 46

Canadian Cross of Sacrifice (WW I / WW II / Korea), Arlington Nat'l Cemetery, https://www.arlingtoncemetery.mil/Explore/Monuments-and-Memorials/Canadian-Cross (last visited Dec. 16, 2018) 7

Cannon County World War I-II Memorial, Nat'l War Mem'l Registry, https://www.nationalwarmemorialregistry.org/joomla/war-memorial-registry-search/tennessee/cannon-county-world-war-i-ii-memorial (last visited Dec. 16, 2018) 8

Cape Henry Memorial: The beginning and end of British America has roots on these windswept sands, Nat'l Park Serv., https://www.nps.gov/came/index.htm (last visited Dec. 16, 2018) 45

George Clausen, *Youth Mouring* (1916), Imperial War Museum, *available at* https://www.iwm.org.uk/collections/item/object/5151 5

TABLE OF AUTHORITIES—Continued

Page(s)

Cypress Hills National Cemetery, Nat'l Park Serv., https://www.nps.gov/nr/travel/national_cemeteries/new_york/cypress_hills_national_cemetery.html (last visited Dec. 16, 2018) 8

Edith Hamilton Daly, 14 J. of the Am. Irish Historical Society (1915) 47

Nese F. DeBruyne, Cong. Research Serv., *American War and Military Operations Causalities: Lists and Statistics* 2 (2018) 4

East Rochester's Forever Young Memorial, Nat'l War Mem'l Registry, https://www.nationalwarmemorialregistry.org/joomla/war-memorial-registry-search/new-york/east-rochester-s-forever-young-memorial (last visited Dec. 16, 2018) 48

Frank C. Foster, United States Army Medals, Badges and Insignias (2011) 46

Jeroen Geurst, Cemeteries of the Great War by Sir Edwin Lutyens (2010) 9

He fought to a finish – You lend to finish Victory Liberty Loan, Library of Congress (1917), *available at* http://www.loc.gov/pictures/item/00652369/ 5

Historic Am. Landscapes Survey, Nat'l Park Serv., Meuse-Argonne American Cemetery & Memorial (2015) 6

Tom Huntington, Guide to Gettysburg Battlefield Monuments (2013) 46

TABLE OF AUTHORITIES—Continued

Page(s)

Vincente Blasco Ibáñez, The Four Horsemen of the Apocalypse (1916) 5, 35

Jerome Township Cemetery World War I Memorial Cross, Nat'l War Mem'l Registry, https://www.nationalwarmemorialregistry.org/joomla/war-memorial-registry-search/ohio/jerome-township-cemetery-world-war-i-memorial-cross (last visited Dec. 16, 2018) 8

W. Keeton et al., Prosser and Keeton on Law of Torts 175 (5th ed. 1984) 56

Alex King, Memorials of the Great War in Britain: The Symbolism and Politics of Remembrance (1998) 9

Gretel C. Kovach, *Marines Hike Memorial Hill*, San Diego Union-Trib. (July 19, 2014, 2:47 PM), https://www.sandiegouniontribune.com/military/sdut-marines-hill-memorial-cross-matthew-abbate-2014jul19-story.html 48

Martin Luther King Jr. National Historic Park: Ebenezer Baptist Church, Nat'l Park Serv., https://www.nps.gov/malu/planyourvisit/ebenezer_baptist_church.htm (last visited Dec. 16, 2018) 44

John McCrae, *In Flanders Fields* (1915), *reprinted in* In Flanders Fields and Other Poems (G.P. Putnam's Sons ed., 1919) 5, 35

TABLE OF AUTHORITIES—Continued

Page(s)

Nick Metcalfe, *The Canadian Cross of Sacrifice at Arlington National Cemetery*, https://ww1sacrifice.com/2015/10/29/the-canadian-cross-of-sacrifice-at-arlington-national-cemetery/ (last visited Dec. 16, 2018) 7

National Register of Historic Places Inventory-Nomination Form: Acadian Landing Site-St. John Valley, 1785, Nat'l Park Serv. (Sept. 20, 1973), https://npgallery.nps.gov/NRHP/GetAsset/NRHP/73000098_text 46

Dave Pelland, *Wayside Cross, New Canaan*, CT Monuments.net: Connecticut History in Granite and Bronze (July 8, 2011), http://ctmonuments.net/2011/07/wayside-cross-new-canaan/ 8

Press Release, Rhode Island Office of Att'y Gen., *AG Kilmartin Applauds Woonsocket for Actions to Defend the WWI & WWII Monument* (May 2, 2012), *available at* https://www.ri.gov/press/view/16435 48

Bruce Scates & Rebecca Wheatley, *War Memorials, in* 3 The Cambridge History of The First World War: Civil Society 528 (Jay Winter ed., 2014) 9

TABLE OF AUTHORITIES—Continued

Page(s)

Julia Sarcinelli, *Fitchburg's White Cross Ceremony honors fallen heroes*, Sentinel & Enterprise News (May 28, 2018, 7:02 AM), http://www.sentinelandenterprise.com/news/ci_31906752/fitchburgs-white-cross-ceremony-honors-fallen-heroes 48

Michael Sledge, Soldier Dead: How We Recover, Identify, Bury, & Honor Our Military Fallen (2005) 6

The Rustic Cross, Smithsonian Am. Art Museum Art Inventories Catalog, https://tinyurl.com/y93z36h3 (last visited Dec. 16, 2018) 8

Marcel Villanueva, The French Contribution to the Founding of the United States (1975) 47

Douglas White, *'It puts a lump in your throat' Memorial crosses going up in Central Park*, The Gleaner (May 11, 2017, 3:37 PM), https://www.thegleaner.com/story/news/2017/05/11/puts-lump-your-throat-memorial-crosses-going-up-central-park/101427194/ 48

Jay Winter, Sites of Memory, Sites of Mourning (2014) 9

IN THE

Supreme Court of the United States

No. 18-18

MARYLAND-NATIONAL CAPITAL PARK AND PLANNING COMMISSION,

Petitioner,

v.

AMERICAN HUMANIST ASSOCIATION, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF FOR PETITIONER MARYLAND-NATIONAL CAPITAL PARK AND PLANNING COMMISSION

INTRODUCTION

For 93 years, a monument commonly referred to as the Peace Cross has stood in commemoration of the residents of Prince George's County, Maryland who perished in the First World War. The Peace Cross is adorned with and surrounded by symbols of secular commemoration: a plaque dedicating it to the servicemen who died; inscriptions honoring the universal values for which they fought; and nearby monuments to those who fell in other wars or national tragedies. It has an unbroken history of community

use as a site for civic commemorative events. And its shape, like hundreds of other monuments built in the aftermath of World War I, takes the form of a Latin cross, the "central symbol of the [World War I] overseas cemetery." JA 1143.

Nonetheless, a divided panel of the Fourth Circuit declared the Peace Cross unconstitutional—and suggested possible remedies like "removing the arms or razing the Cross entirely"—solely because it bears the shape of a cross. Pet. App. 31a-32a & n.19. That decision was grievously incorrect. Time and again, the Court has made clear that the Establishment Clause does not "require eradication of all religious symbols in the public realm." *Salazar* v. *Buono*, 559 U.S. 700, 718 (2010) (plurality). Rather, virtually every Member of the Court has agreed that, at minimum, the government may display symbols associated with religion where the display's purpose and objective meaning are predominantly secular, or where the display fits within a long national tradition of similar practices.

The Peace Cross is easily constitutional on both grounds. Its context and history make plain that it was intended to serve—and, for 93 years, *has* served—as a secular memorial to the war dead. And similar symbolic uses of the cross for secular commemoration have existed in this Nation since before the Founding. If the Peace Cross must fall, so too must numerous other monuments—including two World War I crosses of comparable size and longevity in nearby Arlington National Cemetery.

The Establishment Clause does not compel these senseless results. The Peace Cross fully accords with the Constitution's call for religious neutrality. And

the Court should "let those honored rest in peace." Pet. App. 100a (Wilkinson, J., dissenting from denial of rehearing en banc). The judgment should be reversed.

OPINIONS BELOW

The Fourth Circuit's opinion (Pet. App. 1a-52a) is reported at 874 F.3d 195. The District Court's opinion (Pet. App. 53a-85a) is reported at 147 F. Supp. 3d 373. The Fourth Circuit's order and opinions denying rehearing en banc (Pet. App. 86a-105a) are reported at 891 F.3d 117.

JURISDICTION

The Fourth Circuit entered judgment on October 18, 2017. Petitioner filed a timely petition for rehearing en banc, which was denied on March 1, 2018. On May 9, 2018, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including June 29, 2018. *See* No. 17A1175. This Court granted certiorari on November 2, 2018. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Establishment Clause of the First Amendment, U.S. Const. amend. I, provides:

> Congress shall make no law respecting an establishment of religion.

The Due Process Clause of the Fourteenth Amendment, U.S. Const. amend. XIV, § 1, provides:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law.

STATEMENT

A. Historical Background

1. World War I caused death on a scale that the United States had not experienced since the Civil War. Over the course of the war, more than ten million soldiers from combatant nations gave their lives fighting in Europe. JA 934-935. And in just 19 months, from Congress's declaration of war in April 1917 until the Armistice, over 126,000 American servicemen perished. JA 935; *see* Nese F. DeBruyne, Cong. Research Serv., American War and Military Operations Causalities: Lists and Statistics 2 (2018).

During the war, the U.S. military interred the remains of the fallen in makeshift cemeteries in Europe. Except where its records reflected that a soldier was Jewish—and identifying soldiers was often impossible due to the newly destructive power of the weapons used—the military buried each serviceman under a temporary wooden cross. JA 934-937, 941-943. Photographs of wartime cemeteries published around the world depicted thousands of wooden crosses, arranged in seemingly endless rows. JA 941-943. Few soldiers who served in the war forgot the image of those seas of crosses, which evoked the horrors of the trenches and "the brotherhood of the men who fought in them." JA 940. And for families at home, separated by thousands of miles from the graves of their loved ones, the crosses were an indelible symbol of sacrifice and loss. JA 938.

As respondents' own expert has written, "the cross" thus became "a central symbol of the American overseas cemetery" and "a cultural image of the battlefield." JA 1127, 1143; *see* JA 937-938. Numerous works of poetry, literature, and visual art em-

ployed the cross to represent the aspirations and futility of the Great War. In one of the most famous poems of the war, soldier-poet John McCrae wrote:

> In Flanders fields the poppies blow
> Between the crosses, row on row
> That mark our place * * * *

John McCrae, *In Flanders Fields* (1915), *reprinted in* In Flanders Fields and Other Poems 3 (G.P. Putnam's Sons ed., 1919). Vincente Blasco Ibáñez's novel *The Four Horsemen of the Apocalypse*, the best-selling book in America in 1919, used the image of fields of wooden crosses in its climactic scene to symbolize the war's monumental toll.[1] In his allegorical painting *Youth Mourning* (1916), George Clausen depicts a woman bent over in grief on the edge of a battlefield, overshadowed by a large wooden cross.[2]

The U.S. Government itself employed crosses as a central symbol of the war. During the war, the Government printed posters with images of Latin crosses as battlefield gravesite markers to encourage Americans to invest in war bonds.[3] In 1918 and 1919, the President and Congress established three new medals for valor, all in the shape of a cross: the

---

[1] Vincente Blasco Ibáñez, The Four Horsemen of the Apocalypse (1916).

[2] George Clausen, *Youth Mourning*, Imperial War Museum (1916), *available at* https://www.iwm.org.uk/collections/item/object/5151.

[3] *E.g.*, *He fought to a finish – You lend to finish Victory Liberty Loan*, Library of Congress (1917), *available at* http://www.loc.gov/pictures/item/00652369/.

Distinguished Service Cross, the Navy Cross, and the Air Force Cross. *See* JA 147-151.

When the time came to replace the temporary grave markers in Europe with permanent headstones, veterans groups and Congress strongly advocated retaining the cross shape. The American Legion and the American War Mothers described these crosses as "symbols of sacrifice and remembrance." JA 1146-47; *see* Historic Am. Landscapes Survey, Nat'l Park Serv., Meuse-Argonne American Cemetery & Memorial 30 (2015). A congressional resolution likewise explained that "these wooden symbols have * * * been regarded as emblematic of the great sacrifices which that war entailed." H.R. Res. 16, 68th Cong., at 1 (1924) (at JA 1163-64). The American Battle Monuments Commission made a simple stone cross the default burial marker, including for soldiers whose identity or religion was unknown, while allowing Jewish soldiers to be buried under the Star of David. JA 1147. Several Jewish families elected the cross for their loved ones' graves, stating that they wished "that no distinction be made between them and their Christian comrades." *See* Michael Sledge, Soldier Dead: How We Recover, Identify, Bury, & Honor Our Military Fallen 205 (2005).

2. The aftermath of the war led to an outpouring of monument building to commemorate the men who had fought and died. Many chose to erect these monuments in the shape that had become synonymous with wartime loss: the cross. JA 937-938. Cross monuments served as a reminder of the sacrifices of the fallen soldiers and the cause for which they had fought. *Id.* They also filled an acute need

created by the "scattering of the fallen": Because over 40 percent of servicemen were buried in overseas cemeteries, these monuments served as echoes of those distant tombstones and provided a place for families to grieve and remember. JA 934-937.

Two large cross monuments were built at Arlington National Cemetery. The Argonne Cross, erected in 1923, stands 13 feet tall, contains an image of an eagle and a wreath, and is dedicated "[i]n memory of our men in France."[4] The Canadian Cross of Sacrifice, which was donated to the United States by Canada in 1927, is similar: It is 24 feet high, inlaid with a bronze sword, and contains a dedication to the "citizens of the United States who served in the Canadian Army and gave their lives in the Great War." JA 951-952.[5]

Many other monuments follow a similar design. The St. Mihiel American Cemetery in France features a large limestone cross monument dedicated "to those who died for their country."[6] Sunrise Rock

---

[4] *Argonne Cross (WW I)*, Arlington Nat'l Cemetery, https://www.arlingtoncemetery.mil/Explore/Monuments-and-Memorials/Argonne-Cross (last visited Dec. 16, 2018).

[5] Nick Metcalfe, *The Canadian Cross of Sacrifice at Arlington National Cemetery*, https://ww1sacrifice.com/2015/10/29/the-canadian-cross-of-sacrifice-at-arlington-national-cemetery/ (last visited Dec. 16, 2018); *see also Canadian Cross of Sacrifice (WW I/WW II/Korea)*, Arlington Nat'l Cemetery, https://www.arlingtoncemetery.mil/Explore/Monuments-and-Memorials/Canadian-Cross (last visited Dec. 16, 2018).

[6] Am. Battle Monuments Comm'n, St. Mihiel American Cemetery and Memorial 9, *available at* https://www.abmc.gov/sites/default/files/publications/St.Mihiel_Booklet.pdf (last visited Dec. 16, 2018).

in the Mojave Desert contains an unadorned cross honoring veterans of the war—a monument that Congress has designated as "a national memorial commemorating United States participation in World War I and honoring the American veterans of that war." Department of Defense Appropriations Act, 2002, Pub. L. No. 107–117, div. A, tit. VIII, § 8137(a), 115 Stat. 2230, 2278; *see Buono*, 559 U.S. at 705-706 (plurality). By one estimate, at least 40 World War I monuments were built in the United States that bear the shape of a cross. JA 1130.[7]

---

[7] *E.g.*, *28th Infantry Division National Shrine & Monuments*, Pennsylvania Military Museum, https://www.pamilmuseum.org/the-monuments-shrine/ (last visited Dec. 16, 2018) (Boalsburg, Pennsylvania); *Jerome Township Cemetery World War I Memorial Cross*, Nat'l War Mem'l Registry, https://www.nationalwarmemorialregistry.org/joomla/war-memorial-registry-search/ohio/jerome-township-cemetery-world-war-i-memorial-cross (last visited Dec. 16, 2018) (Plain City, Ohio); *Cannon County World War I-II Memorial*, Nat'l War Mem'l Registry, https://www.nationalwarmemorialregistry.org/joomla/war-memorial-registry-search/tennessee/cannon-county-world-war-i-ii-memorial (last visited Dec. 16, 2018) (Woodbury, Tennessee); *Cypress Hills National Cemetery*, Nat'l Park Serv., https://www.nps.gov/nr/travel/national_cemeteries/new_york/cypress_hills_national_cemetery.html (last visited Dec. 16, 2018) (Brooklyn, New York); *The Rustic Cross*, Smithsonian Am. Art Museum Art Inventories Catalog, https://tinyurl.com/y93z36h3 (last visited Dec. 16, 2018) (Augusta, Georgia); Dave Pelland, *Wayside Cross, New Canaan*, CT Monuments.net: Connecticut History in Granite and Bronze (July 8, 2011), http://ctmonuments.net/2011/07/wayside-cross-new-canaan/ (New Canaan, Connecticut).

Numerous World War I monuments abroad use the cross symbol, as well. JA 944-954. The United Kingdom, Canada, and Australia collectively built hundreds of "Crosses of Sacrifice" to commemorate the war. *See* JA 951-954; Jeroen Geurst, Cemeteries of the Great War by Sir Edwin Lutyens 46 (2010); Bruce Scates & Rebecca Wheatley, *War Memorials*, *in* 3 The Cambridge History of The First World War: Civil Society 528 (Jay Winter ed., 2014). France—a country whose policy of *laïcité* commands strict separation of church and state—marked graves in its battlefield cemeteries with crosses, JA 945-948, mirroring the battlefield "*croix de bois*" (wooden crosses) that had become known as "the privileged sign of French loss," Scates & Wheatley, *supra*, at 536. Germany shared the symbol, as reflected poetically by a mourner at the war cemetery at Roggevelde, who described "cross upon cross * * * on most of the graves there were low, yellow wooden crosses." Jay Winter, Sites of Memory, Sites of Mourning 109 (2014). As Charles Jagger, a veteran of World War I and a prominent post-war sculptor for the British War Memorials Committee, explained, the cross "has been and probably always will be the symbol of the Great War." Alex King, Memorials of the Great War in Britain: The Symbolism and Politics of Remembrance 129 (1998).

B. Factual Background

1. In 1919, residents of Prince George's County, Maryland also chose to use the symbol of the cross to commemorate those they had lost in World War I. JA 909. That year, a group of bereaved mothers and other residents of the county formed the Prince George's County Memorial Committee for the pur-

pose of honoring the 49 residents of the county who had died in the war. Pet. App. 55a; *see* JA 974, 988-990. In its fundraising materials, the committee explained that it wished to build a memorial at "a strategic position" on "the Defense Highway leading from Washington to Annapolis," so that "the friends and loved ones of those who were in the great conflict will pass daily over a highway memorializing their boys who made the supreme sacrifice," and so that visitors could "renew the fires of patriotism and loyalty to the nation which prompted these young men to rally to the defense of the right." Pet. App. 56a. The citizen-organizers also distributed fund-raising pledge sheets that declared their "trust[] in God" and stated that "we contribute to this memorial cross commemorating the memory of those who have not died in vain." Pet. App. 55a-56a.

The committee hired John Joseph Earley, a noted sculptor and pioneer in the figurative use of concrete, to design the monument. JA 906, 909. The committee broke ground on the memorial site in September 1919. Pet. App. 56a; *see* JA 910, 989. The mother of the first county resident killed in France shoveled the ceremonial first spadeful of earth, and Secretary of the Navy Josephus Daniels delivered the keynote address. *Id.* Following the groundbreaking, one bereaved mother wrote to her senator thanking him for his contribution in support of the monument: "The chief reason I feel so deeply in this matter," she explained, is that "my son * * * lost his life in France and because of that I feel that our memorial cross is, in a way, his grave stone." JA 989; *see also* JA 937 & n.11.

By 1922, the committee had run out of funds, and construction halted. JA 910. To save the effort, a local post of the American Legion—a patriotic veterans organization formed after World War I—took over the project. JA 905-912. It completed the monument in 1925. At the dedication ceremony, U.S. Representative Stephen W. Gambrill gave a speech honoring the "men of Prince George's County" who "fought for the sacred right of all to live in peace and security." JA 933. He expressed hope that the cross, which he at one point referred to as "symbolic of Calvary," would "let us keep fresh the memory of our boys who died for a righteous cause." JA 449, 933; *see also* Pet. App. 59a.

2. The Peace Cross rises 32 feet above its pedestal and bears the shape of a Latin cross. JA 1528; Pet. App. 54a. At its base, a large plaque lists the names of the 49 residents of Prince George's County who died in the war, and states: "This Memorial Cross is dedicated to the heroes of Prince George's County, Maryland, who lost their lives in the Great War for the liberty of the world." JA 932. At the bottom, the plaque bears a quotation from President Wilson's speech to Congress asking for a Declaration of War, stating "The right is more precious than peace." *Id.*[8] Four words are inscribed on the monument, one on each face: "VALOR; ENDURANCE; COURAGE; DEVOTION." JA 990-991; *see also* Pet. App. 24a, 55a. The symbol of the American Legion is displayed

---

[8] The full inscription reads: "The right is more precious than peace. We shall fight for the things we have always carried nearest our hearts. To such a task we dedicate our lives. Woodrow Wilson." JA 932.

at the monument's center, and an American flag flies at one side. JA 931, 1453; Pet. App. 8a, 55a. Not a single word with a religious connotation appears on or near the Peace Cross.

In the decades since the Peace Cross was erected, other memorials have been built nearby to honor the veterans and fallen of other conflicts—a collection now known as Veterans Memorial Park. Pet. App. 60a, 102a; JA 993. In 1944, a local American Legion post constructed a stone scroll 200 feet south of the Peace Cross to honor the men and women of Prince George's County who died in World War II. JA 991-992. On July 4, 1983, a monument was dedicated beside the World War II memorial to honor the veterans of the Korean and Vietnam Wars. JA 993. Other memorials within this small park commemorate the War of 1812, the victims of Pearl Harbor, and the lives lost on September 11, 2011. JA903, 1528-29; *see also* JA 934. Recently, the community added two 38-foot-tall markers depicting soldiers who fought in the Battle of Bladensburg. JA 1530.

From its inception and up through the present day, the Peace Cross has consistently been used by the local community as the site of patriotic events to honor the Nation's veterans. *See, e.g.*, JA 235-273, 541-612. These events have routinely taken place on Veterans Day, Memorial Day, or Independence Day, and typically follow the same format: There is the presentation of colors, a singing of the national anthem, an invocation, a keynote speaker—often a veteran or military official—a song or readings, the laying of a wreath or flowers, a benediction, and a reception. JA 319-323. The only mention of a religious event at the memorial is a private newspaper

advertisement for a revival meeting from 1931, and there is no record that the event actually took place. JA 1432; *see* Pet. App. 62a & n.5. Until the present suit, no one ever challenged the monument's legality. Pet. App. 23a.

In 1960, petitioner the Maryland-National Park and Planning Commission (the Commission), an independent Maryland state agency, acquired the Peace Cross in order to preserve the monument and address traffic safety concerns arising from the expansion of a nearby roadway. Pet. App. 59a-60a, 72a; Md. Code Ann., Land Use § 15-101; *see also* JA 1386-87. When the Commission obtained the monument, the American Legion reserved the right "to hold memorial services to departed veterans and other ceremonies" at the memorial. JA 1387; *see also* Pet. App. 60a. Over the five decades that followed, the Commission spent approximately $117,000 to maintain and preserve the monument; in 2008, it budgeted $100,000 for renovations. Pet. App. 8a, 63a. The Monument has been listed on the National Register of Historic Places and forms a part of the Star Spangled Banner National Historic Trail. JA 1599-1601; *see also* Pet. App. 63a n.6.

C. Procedural History

1. Respondents are three local residents and the American Humanist Association. Respondent Steven Lowe has lived in the area for decades and first encountered the Peace Cross in 1982. JA 29. He estimates that he "passes [the Cross] on average, about once a month." *Id.* Respondent Fred Edwords first saw the monument in 2002 and has seen it several times since, while respondent Bishop McNeill

moved to the area in 2013 and saw it at least four times that year. *See* JA 30.

Respondents filed this suit in 2014. *See* JA 27. They contended that, because of its shape, the Peace Cross constitutes an unconstitutional endorsement of Christianity, and asked that the court order the removal or demolition of the memorial, or the removal of its arms "to form a non-religious slab or obelisk." Pet. App. 11a n.7. The American Legion and its local affiliates intervened as defendants. After extensive discovery—in which the parties introduced expert reports and produced thousands of pages of documents—the parties moved for summary judgment.

The District Court granted summary judgment to the defendants. Pet. App. 54a. The court found "uncontroverted," "overwhelming evidence" that "the predominant purpose of the [Peace Cross] was for secular commemoration." Pet. App. 72a-73a. Furthermore, it found that the monument's "history and context"—including the numerous "secular elements on its face," the "secular memorials" that surround it, the monument's "nearly exclusive use" as a war memorial "for its entire history," and the absence of any legal challenge for nearly nine decades—made clear to any "reasonable observer" that the Peace Cross does not "endors[e] religion." Pet. App. 77a-78a. The district court accordingly concluded that the Peace Cross satisfies the requirements of both *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971), and the analysis applied by Justice Breyer's concurrence in *Van Orden* v. *Perry*, 545 U.S. 677 (2005). *See* Pet. App. at 83a.

2. A divided panel of the Fourth Circuit reversed.[9] Writing for the majority, Judge Thacker "s[aw] fit to apply *Lemon*" in this case, while giving "due consideration" to the "factors" Justice Breyer considered in *Van Orden*. Pet. App. 17a. The panel acknowledged that the memorial "satisfied the first prong of *Lemon*": The Commission had "obtained the Cross" to "maint[ain] *** safety near a busy highway intersection," and it "preserve[d] the memorial to honor World War I soldiers," both plainly "legitimate secular purposes." Pet. App. 19a. But the panel concluded that the memorial "fails the second and third prongs of *Lemon*" because it "endorses Christianity—not only above all other faiths, but also to their exclusion." Pet. App. 28a, 31a.

The panel rested this conclusion on a single, overriding consideration: that the memorial bears the shape of a large cross. "The Latin cross," the panel reasoned, "is the 'preeminent symbol of Christianity.'" Pet. App. 20a (quoting *Buono* v. *Norton*, 371 F.3d 543, 545 (9th Cir. 2004)). Although a cross "may generally serve as a symbol of death and memorialization," the court continued, "it only holds value as a symbol of death and resurrection *because* of its affiliation with the crucifixion of Jesus Christ." Pet. App. 20a-21a. Thus, the panel concluded, "[e]ven in the memorial context, a Latin cross serves not simply as a generic symbol of death, but rather a

---

[9] The Fourth Circuit found that respondents had standing because they had endured "unwelcome direct contact with a religious display that appears to be endorsed by the state" when "driving in the area." Pet. App. 13a (quoting *Suhre* v. *Haywood Cty.*, 131 F.3d 1083, 1086 (4th Cir. 1997)).

Christian symbol of the death of Jesus Christ." Pet. App. 21a.

The panel found that neither the history of the Peace Cross nor its secular content and context altered this exclusively sectarian meaning. The historical use of the cross "as a commemorative symbol of World War I" was "of no moment," the panel reasoned, because crosses "on World War I battlefields were *individual*—rather than universal—memorials to the lives of Christian soldiers." Pet. App. 21a-22a. Likewise, it was immaterial that the Peace Cross had "stood unchallenged for 90 years" and "primarily" been used for "veteran-focused ceremonies" throughout that time. Pet. App. 23a. The "invocations and benedictions" at veterans' events, the panel stated, were themselves "group prayer[s]." *Id.* Further, the panel claimed that, unlike the Ten Commandments and "In God We Trust," the Latin cross is not "well known as being tied to our Nation's history and government." Pet. App. 22a. And, notwithstanding *Van Orden*, it was "too simplistic" to consider the monument's long history without challenge to be evidence of its "secular effect." Pet. App. 23a-24a. "Perhaps the longer a violation persists," the panel countered, "the greater the affront to those offended." *Id.*

The panel likewise discounted the monument's exclusively secular content and context. "Admittedly," the panel said, "the Cross contains a few secular elements," including "the plaque," "the Legion symbol," "the words 'valor,' 'endurance,' 'courage,' and 'devotion' inscribed on its base," the "American flag flying in its vicinity," and "its location in the Veterans Memorial Park." Pet. App. 24a. But the panel

expressed concern that "passers-by" might not view all of the monument's secular features, since it is "located in a high-traffic area" where "one could [not] easily park," and the plaque is "weathered" and once was partially "obscured" by "bushes." Pet. App. 25a-26a (citing *Am. Atheists, Inc.* v. *Davenport*, 637 F.3d 1095, 1121 (10th Cir. 2010)). The panel added that a "reasonable observer" "could not help but note" that the monument is taller and more "prominent" than the surrounding monuments. Pet. App. at 28a. This discrepancy, the panel reasoned, "evoke[d] a message of aggrandizement and universalization of religion." Pet. App. 24a-25a (quoting *Trunk* v. *City of San Diego*, 629 F.3d 1099, 1116 n.18 (9th Cir. 2011)).

Thus, the court held that "the Cross * * * ha[s] the primary effect of endorsing religion." Pet. App. 27a. And, for much the same reason, it found that the Commission's maintenance of the Peace Cross resulted in "excessive entanglement between government and religion." Pet. App. 30a (quoting *Lambeth* v. *Bd. of Comm'rs of Davidson Cty.*, 407 F.3d 266, 272-273 (4th Cir. 2005)). By expending even "de minimis" funds to preserve the monument, the panel said, the Commission impermissibly "promot[ed] * * * a religious doctrine, Christianity." Pet. App. 30a-31a & n.18.

Chief Judge Gregory dissented. He explained that "the Supreme Court has consistently concluded that displays with religious content—but also with a legitimate secular use—may be permissible under the Establishment Clause." Pet. App. 43a (internal quotation marks omitted). In his view, that principle resolved this case: The "appearance, context, and factual background" of the Peace Cross made clear to

the reasonable observer that "the Memorial, while displaying a religious symbol, is a war memorial built to celebrate the forty-nine Prince George's County residents who gave their lives in battle." Pet. App. 44a-45a, 49a (emphasis omitted). The majority's conclusion that "the size of the Latin cross * * * overwhelms these secular elements," Chief Judge Gregory wrote, "would lead to per se findings that all large crosses are unconstitutional despite any amount of secular history and context." Pet. App. 44a-45a.

3. The Fourth Circuit voted 8-6 to deny rehearing en banc. *See* Pet. App. at 87a-88a. Chief Judge Gregory, Judge Wilkinson, and Judge Niemeyer all filed dissents. *See* Pet. App. at 88a. Chief Judge Gregory reiterated the views in his panel dissent, Pet. App. 98a, and Judge Wilkinson agreed: He would have "let the cross remain and let those honored rest in peace." Pet. App. 100a. Judge Niemeyer explained that "[i]t strains established judicial analysis to conclude that *Van Orden* does not allow the monument in this case to stand," given that every "observation[ ]" that Justice Breyer made of the Ten Commandments monument in *Van Orden* is applicable to the Peace Cross, too. Pet. App. 105a. Judge Niemeyer added that, by striking down the memorial, the panel's decision needlessly "puts at risk hundreds, and perhaps thousands, of similar monuments," including "those in nearby Arlington National Cemetery, where crosses of comparable size stand in commemoration of fallen soldiers." Pet. App. 101a, 105a.

SUMMARY OF ARGUMENT

The Fourth Circuit's decision would compel the removal or destruction of a 93-year-old war memorial that was erected to honor the men who died in World War I, and that for nine decades has been used exclusively for that purpose, solely because it bears the shape of a cross. That decision was profoundly mistaken, and neither the Establishment Clause nor this Nation's history and traditions support it.

A. The Court has time and again held that the Establishment Clause "does not require eradication of all religious symbols in the public realm." *Buono*, 559 U.S. at 718 (plurality). Rather, governments may permissibly display symbols associated with a particular religion in order to promote universal values, honor historical events, or acknowledge the role of religion in society. *See Van Orden*, 545 U.S. at 702 (Breyer, J., concurring in judgment); *Lynch* v. *Donnelly*, 465 U.S. 668, 674-675 (1984). Such benign invocations of religion do not meaningfully threaten the values of religious neutrality the Clause protects. On the contrary, requiring the destruction or dismemberment of buildings, monuments, and other cherished structures that employ religious symbols and idioms would tend to promote the very sort of religiously-based divisiveness the Clause is designed to avoid. *Van Orden*, 545 U.S. at 699 (Breyer, J., concurring in judgment).

Members of this Court have not agreed on a single test to govern Establishment Clause challenges to passive displays that use religious symbols. But all have agreed that, at minimum, such displays comport with the Establishment Clause in at least two circumstances.

First, there is widespread agreement that a display does not violate the Establishment Clause if both the government's *purpose* in maintaining the display and the *objective meaning* of the display are predominantly secular. In recent cases, the Court has made clear that courts should take a wide-angle view of the monument's context in identifying its purpose and meaning: In addition to examining the face of the display and its immediate surroundings, courts should consider how the symbol is generally used, the circumstances surrounding the monument's placement, the broader physical setting of the monument, and the history of the monument. In *Van Orden*, Justice Breyer's controlling opinion applied this approach to uphold a display of the Ten Commandments on the grounds of the Texas State Capitol. 545 U.S. at 703-704 (Breyer, J., concurring in judgment). And in *Buono*, the plurality applied a similar approach to invalidate an injunction that would have compelled the removal of a 76-year-old cross-shaped World War I memorial. 559 U.S. at 719-721 (plurality).

Second, the Court has held that a display or practice accords with the Establishment Clause if it fits within a longstanding history or tradition of similar practices. *Town of Greece* v. *Galloway*, 572 U.S. 565, 576-577 (2014). When a longstanding practice has not stirred sectarian controversy, that is a powerful indicator that it can coexist peacefully with principles of disestablishment. Moreover, individuals will generally understand such longstanding traditions as ways of solemnizing or of honoring universal values, not as means of expressing religious favoritism or coercing religious practice.

B. Under either of these approaches, the Peace Cross is plainly constitutional.

Every one of the contextual factors this Court has previously considered affirms that the purpose and objective meaning of the Peace Cross are secular. The symbol at the heart of the monument—the cross—has a ubiquitous and well-established meaning of commemorating military valor and sacrifice, especially when associated with World War I. Multiple physical features of the monument—including the dedication, inscriptions, and American Legion symbol, as well as the monument's origin as a way of commemorating the war dead—reinforce that secular message. The physical setting of the monument, Veterans Memorial Park, is a collection of secular memorials to the fallen of our Nation's conflicts. And the monument's nine-decade history without controversy, during which time it acquired an additional meaning as an artistic and historical landmark, confirms that the Peace Cross has a secular purpose and meaning.

The Peace Cross also fits within a widespread and venerable national tradition of using the cross as a symbol of valor and sacrifice. Monuments using the cross this way have existed in this Nation since before the Founding, and cross-shaped military memorials are especially common to honor those who fell in the Civil War and World War I. Congress has given recognition to this tradition by enacting statutes that designate cross-shaped memorials as national monuments to war dead and by creating military decorations in the shape of a cross to honor martial valor. The Peace Cross fits well within this tradition.

The principles underlying the Establishment Clause confirm that it is constitutional. If the Peace Cross must fall, then so too must countless other longstanding monuments to war dead, including the Argonne Cross and Canadian Cross of Sacrifice at Arlington National Cemetery. Such widespread acts of destruction would evince profound disrespect for those most deserving of the Nation's honor, and would tend to promote the very sort of social conflict the Establishment Clause seeks to avoid.

C. Because the basic principles of the Court's Establishment Clause precedents lead to a clear result, the Court need not apply the *Lemon* test here. But that test yields the same conclusion. As even the Fourth Circuit recognized, the Commission has an obvious and legitimate secular purpose for maintaining the Peace Cross. For all the reasons the Peace Cross passes muster under the proper analysis outlined above, it also has a secular effect. The Fourth Circuit concluded otherwise only by conceiving of the "reasonable observer" as an imperfectly informed passerby who would overlook the monument's secular context and history; the Court's precedents firmly instruct otherwise. Nor does the Peace Cross entangle the government with religion, as its maintenance requires no involvement with religious activities at all.

Under any approach, the Peace Cross comports with the Establishment Clause. No sensible application of the Constitution would compel its destruction or dismemberment. The judgment below should be reversed.

ARGUMENT

THE PEACE CROSS DOES NOT VIOLATE THE ESTABLISHMENT CLAUSE.

A. A Government Display That Uses Religious Symbolism Is Constitutional If Its Purpose And Objective Meaning Are Secular Or If It Comports With The Nation's History And Traditions.

1. The Establishment Clause mandates religious neutrality. It bars any governmental effort to favor one religion or denigrate another. *Larson* v. *Valente*, 456 U.S. 228, 246 (1982). It prohibits state efforts, implicit or otherwise, to coerce religious practice. *Walz* v. *Tax Comm'n of City of New York*, 397 U.S. 664, 668-669 (1970). It forbids the establishment of a state church, or state interference in how private citizens choose (or choose not) to worship. *Id.* at 669. These principles are not disputed here.

These principles do not, however, "compel the government to purge from the public square all that in any way partakes of the religious." *Van Orden*, 545 U.S. at 699 (Breyer, J., concurring in judgment). As centuries of practice and decades of this Court's precedents have made clear, the government may use language and display symbols drawn from religion without contravening the constitutional commitment to religious neutrality. Government buildings—from this Court to town halls throughout the country—use religious symbols to invoke shared values like pluralism and respect for law. *See Van Orden*, 545 U.S. at 688-689 (plurality). Monuments scattered across battlefields and municipal parks employ religious imagery to honor heroic achieve-

ments and commemorate historic events. *See Buono*, 559 U.S. at 721 (plurality). The national anthem, the pledge, and the dollar bill—like the mottoes, flags, and seals of many States—explicitly invoke the importance Americans assigned divine providence at the Nation's Founding. *See Lynch*, 465 U.S. at 676; *Elk Grove Unified Sch. Dist.* v. *Newdow*, 542 U.S. 1, 35-36 & n.* (2004) (O'Connor, J., concurring in judgment).

The ubiquity of these references to religion is unsurprising. "The history of man is inseparable from the history of religion." *Engel* v. *Vitale*, 370 U.S. 421, 434 (1962). Much "in our culture worth transmitting"—indeed, much "which gives meaning to life"—"is saturated with religious influences." *People of State of Ill. ex rel. McCollum* v. *Bd. of Educ. of Sch. Dist. No. 71, Champaign Cty.*, 333 U.S. 203, 236 (1948) (Jackson, J., concurring). It is natural that Americans have often chosen to express their values and honor their history in words and idioms that reference religion. *See Newdow*, 542 U.S. at 35-36 (O'Connor, J., concurring in judgment).

As the Court has time and again explained, such benign invocations of religion do not in any meaningful way threaten the values the Establishment Clause is designed to protect. *See Lynch*, 465 U.S. at 673-678. Because they speak to values or honor historical memories that Americans may share irrespective of their religion, such symbols and practices do not diminish anyone's status in the political community because of her religious beliefs, or her adherence to no religion at all. *See id.* at 692-693 (O'Connor, J., concurring). They do not coerce anyone, implicitly or otherwise, to adhere to a par-

ticular doctrine, or place the weight of government behind a favored creed. *Cty. of Allegheny* v. *ACLU*, 492 U.S. 573, 660-663 (1989) (Kennedy, J., concurring in judgment in part and dissenting in part).

On the contrary, proscribing these widespread practices and symbols would itself "tend to promote the kind of social conflict the Establishment Clause seeks to avoid." *Van Orden*, 545 U.S. at 699 (Breyer, J., concurring in judgment). It would uproot long-settled practices and compel the demolition or dismemberment of countless cherished buildings and monuments. *Id.* at 702-703. Such "a brooding and pervasive devotion to the secular" would evince not neutrality toward religion, but "a passive, or even active, hostility to the religious." *Sch. Dist. of Abington Twp.* v. *Schempp*, 374 U.S. 203, 306 (1963) (Goldberg, J., concurring). And it would inevitably "create new controversy" and "begin anew the very divisions along religious lines that the Establishment Clause seeks to prevent." *Town of Greece*, 572 U.S. at 577.

2. For these reasons, it is undisputed that there is no categorical prohibition on government displays, buildings, and monuments that employ religious symbolism. On the contrary, the Court has repeatedly upheld physical displays that use religious symbols, including the crèche in *Lynch*, the menorah in *Allegheny*, and the Ten Commandments in *Van Orden*.

This Court has sometimes divided, however, on the proper approach for evaluating such displays. Members of the Court have disagreed as to whether an improper government *purpose* is necessary or sufficient to establish that a passive display is unconsti-

tutional. *Compare McCreary Cty.* v. *ACLU*, 545 U.S. 844, 861-862 (2005), *with id.* at 902 (Scalia, J., dissenting). Justices have also disagreed as to whether a display may constitutionally favor religion over non-religion generally. *See Town of Greece*, 572 U.S. at 619 (Kagan, J., dissenting) (describing disagreement).

But nearly every Member of the Court has agreed on at least this much: A passive monument that uses religious symbolism does not violate the Establishment Clause if either (1) the purpose and the objective meaning of the display are predominantly secular, or (2) the monument fits into a national history and tradition of similar displays. Justices have divided on the appropriate result if one or both of those criteria is *not* satisfied. But the Court has been virtually unanimous that a monument is constitutional at least where both are.

a. First, every Member of the Court to consider the question has agreed that, at minimum, an Establishment Clause challenge to a passive display fails out of the gate if both the government's purpose in maintaining the display and the objective meaning of the display are predominantly secular.

In *Van Orden* and *McCreary*, for instance, every Justice agreed that a government may permissibly display the Ten Commandments if the purpose and objective meaning of the display is to communicate a moral, legal, or historical message. In his controlling concurrence in *Van Orden*, Justice Breyer upheld the display of a Ten Commandments monument on the grounds of the Texas State Capitol because he found that the State "intended the *** nonreligious aspects of the tablets' message to predominate" and

because, in context, the display in fact "communicates *** a secular message." 545 U.S. at 701 (Breyer, J., concurring in judgment). The dissenters in *Van Orden* and the majority in *McCreary* likewise found that there are "any number of perfectly constitutional depictions" of the Commandments, where context indicates that the government lacks a "religious purpose" and the display does not convey a "religious message." *Id.* at 740-741 (Souter, J., dissenting); *see McCreary*, 545 U.S. at 873-874 (explaining that "there is no risk" that the Ten Commandments in the frieze of this Court "would strike an observer as evidence that the National Government was violating neutrality in religion"). And while disagreeing that a predominantly secular purpose and meaning are *required*, the plurality in *Van Orden* and the dissenters in *McCreary* had no doubt that a display of the Commandments is constitutional where the government lacks "a primarily religious purpose" and the display conveys the Commandments' "historical meaning." *Van Orden*, 545 U.S. at 690-691 & n.11 (plurality); *see McCreary*, 545 U.S. at 905 (Scalia, dissenting).

Other passive display cases dating back decades have agreed on this constitutional minimum. In *Lynch*, the Court upheld a city's display of a crèche during the holiday season because it found the government's "purpose" and the "primary effect" of the display was "to depict the origins of [the Christmas] Holiday." 465 U.S. at 680-681. In *Allegheny*, the Court upheld the display of a menorah in a county holiday display because, in context, the purpose of the display and its objective meaning was to convey a message of pluralism and acknowledgment of the winter holidays. 492 U.S. at 616 (opin-

ion of Blackmun, J.); *id.* at 634 (O'Connor, J., concurring in part and concurring in judgment); *id.* at 663 (Kennedy, J., concurring in judgment in part and dissenting in part). And in *Buono*, the plurality held that the lower courts erred in compelling the removal of a 76-year-old cross-shaped World War I monument because, it explained, that cross was not erected "to promote a Christian message" and because it did not serve "merely as a reaffirmation of Christian beliefs" but as "a symbol * * * to honor and respect" the war dead. 559 U.S. at 715-716, 721 (plurality); *see also id.* at 747 n.7 (Stevens, J., dissenting) (suggesting that a cross may constitutionally be used as "one part of a more elaborate monument that, taken as a whole, may be understood to convey a primarily nonreligious message").

In addition to agreeing on the bedrock principle that governments may constitutionally display religious symbols for a secular purpose and to convey a secular message, Members of the Court have also agreed that, in evaluating purpose and meaning, courts must take into account the full "context" of a display. *See Lynch*, 465 U.S. at 679; *Buono*, 559 U.S. at 721 (plurality); *Van Orden*, 545 U.S. at 700 (Breyer, J., concurring in judgment); *see also McCreary*, 545 U.S. at 905 (Scalia, J., dissenting) (Ten Commandments display must be understood in light of "context"); *Allegheny*, 492 U.S. at 666 (Kennedy, J., concurring in judgment in part and dissenting in part) (crèche must be interpreted in light of "relevant context"). That context is not limited to the display's aesthetic details or its immediate surroundings. Rather, it includes the full range of considerations relevant to understanding the meaning the government conveys through the monument, including the

social meaning of the symbol being used, the circumstances surrounding its placement, the monument's physical setting, and its history. *See Pleasant Grove City* v. *Summum*, 555 U.S. 460, 474-477 (2009).

For example, in order to assess the purpose and meaning of the government's maintenance of the monument in *Van Orden*, Justice Breyer looked to a range of factors beyond the symbolism of the monument itself. In particular, he observed that (1) the Ten Commandments are often displayed to convey "not simply a religious message[,] but also a secular moral message" and "a historical message"; (2) the face of the monument and the "circumstances surrounding [its] placement on the capitol grounds" indicated its designers' "ethics-based" message; (3) the "physical setting" of the monument, particularly its placement in a park containing other monuments celebrating the "historical 'ideals' of Texans," caused "the display's moral message * * * to predominate"; and (4) "40 years passed in which the presence of the monument, legally speaking went unchallenged," suggesting that few individuals had in fact "understood the monument as amounting * * * to a government effort to favor a particular religious sect." 545 U.S. at 701-702 (Breyer, J., concurring in judgment). Taken together, Justice Breyer concluded, these contextual considerations made clear that "the State itself intended the * * * nonreligious aspects of the tablets' message to predominate," and that for over 40 years, "that has been its effect." *Id.* at 701.

The *Buono* plurality considered a very similar set of factors in reaching its holding. In that case, the district court and the Ninth Circuit had invalidated

the cross monument, along with a federal statute Congress enacted to preserve it, on the ground that the Latin cross is a Christian symbol. 559 U.S. at 708-711 (plurality). A plurality of this Court held that this reasoning "took insufficient account of the context" surrounding the cross and the statute. *Id.* at 715; *see id.* at 721. And it pointed specifically to many of the same contextual considerations relied on by Justice Breyer in *Van Orden*, observing that (1) the Latin cross is "a symbol often used to honor and respect" the war dead, and "not merely a reaffirmation of Christian beliefs," *id.* at 721; (2) "those who erected the cross intended simply to honor our Nation's fallen soldiers," as reflected by the inclusion of a Veterans of Foreign Wars insignia on the cross itself, *id.* at 715; and (3) after "seven decades," "time also ha[d] played its role" in giving the cross a "historical meaning" as a "national memorial" to those "killed or wounded in World War I," *id.* at 716 (citing *Van Orden*, 545 U.S. at 702-703 (Breyer, J., concurring in judgment)). In light of these considerations, the plurality held, it was erroneous to conclude that the cross was erected in "an attempt to set the *imprimatur* of the state on a particular creed" or to "promote a Christian message." *Id.* at 715.

Importantly, none of the Court's opinions have looked at a display from the perspective of a "casual passerby." *Capitol Square Review and Advisory Bd.* v. *Pinette*, 515 U.S. 753, 779 (1995) (O'Connor, J., concurring in part and concurring in judgment). As the *Buono* plurality explained, the objective meaning of a display and the government's purpose in maintaining it must be assessed from the perspective of someone "who knows *all* of the pertinent facts and circumstances surrounding the symbol and its

placement," and who considers the monument "in the context of *all* relevant factors." 545 U.S. at 721 (emphases added) (citing *Pinette*, 515 U.S. at 780 (O'Connor, J., concurring in part and concurring in judgment); *Van Orden*, 545 U.S. at 700 (Breyer, J., concurring in judgment)). That ordinarily requires analysis of the varied meanings of the symbol being used, and the display's origin, setting, and context. The fact that a person unaware of these facts may *misunderstand* the Government's purpose or the meaning of a display does not render it unconstitutional.

In short, while the Court has disagreed as to the particular ways that the purpose and meaning of a display should be weighed in considering an Establishment Clause challenge, it has reached broad agreement on two principles: A display does not violate the Establishment Clause where the Government's purpose and the display's objective meaning are both secular; and in evaluating purpose and meaning, a court must consider the full context of the monument, not merely the religious meaning of the symbol the monument uses.

b. The Court has also identified a second, independently sufficient ground for finding that a passive display is constitutional. As the Court has repeatedly explained, "the Establishment Clause must be interpreted 'by reference to historical practices and understandings.'" *Town of Greece*, 572 U.S. at 576 (quoting *Allegheny*, 492 U.S. at 670 (Kennedy, J., concurring in judgment in part and dissenting in part)). Where a government practice has long been engaged in without significant controversy, that "show[s] that" it can "coexis[t] with the principles of

disestablishment and religious freedom" that the Clause protects. *Id.* at 576, 578. Indeed, the very longevity of a practice often shapes its meaning, leading it to be understood as a way of honoring what is worth valuing in society rather than establishing religion. *See id.* at 583-584; *Van Orden*, 545 U.S. at 702 (Breyer, J., concurring in judgment). Thus, "where history shows that [a] specific practice is permitted," it is "not necessary to define the precise boundary of the Establishment Clause"; history alone is powerful evidence that it is constitutional. *Town of Greece*, 572 U.S. at 577; *see also Allegheny*, 492 U.S. at 670 (Kennedy, J., concurring in judgement in part and dissenting in part).

Accordingly, the Court has repeatedly upheld displays and practices on finding that they are deeply rooted in our Nation's history and traditions. In *Lynch*, the Court upheld the display of the crèche in part because it fit within a long history of "official acknowledgments *** of the role of religion in American life" and "other forms of taking official note of Christmas." 465 U.S. at 674, 686. In *Marsh* v. *Chambers*, 463 U.S. 783 (1983), and *Town of Greece*, the Court held that the practice of opening legislative meetings with a prayer is constitutional because, after 200 years, such prayers have "become part of the fabric of our society." *Town of Greece*, 572 U.S. at 576 (quoting *Marsh*, 463 U.S. at 792); *see id.* at 616, 622 (Kagan, J., dissenting) (agreeing that *Marsh* was correctly decided and that "legislative prayer has a distinctive constitutional warrant by virtue of tradition"). Other decisions have made clear that practices dating back even a few decades—including the use of the phrase "In God We Trust" on the Nation's currency, or this Court's practice of opening its

sessions with the phrase "God Save * * * this Honorable Court"—are plainly constitutional. *Marsh*, 463 U.S. at 786; *Lynch*, 465 U.S. at 693 (O'Connor, J., concurring); *see also Van Orden*, 545 U.S. at 688-689 (plurality); *Newdow*, 542 U.S. at 35-36 (O'Connor, J., concurring in judgment); *Newdow* v. *Roberts*, 603 F.3d 1002, 1017 & n.3 (D.C. Cir. 2010) (Kavanaugh, J., concurring in judgment) (observing that the Court has held that prayer practices "'deeply embedded in the history and traditions of this country'" are typically constitutional, and that "[t]he Court's religious display cases have followed [a similar] approach" (quoting *Marsh*, 463 U.S. at 786)).

Of course, history and tradition are not dispositive in every circumstance. It may be that a practice, although longstanding, has often been employed to proselytize or denigrate non-adherents. *Town of Greece*, 572 U.S. at 582-583. And a specific practice may vary from tradition in a way that removes it from that tradition's protective ambit—for instance, by involving explicit calls to prayer or intrusive sectarian content. *Id.* at 582-585 (majority opinion); *id.* at 588-89 (plurality); *see also id.* at 629 (Kagan, J., dissenting). But where a display maps closely on to a history of displays that have been erected and maintained without meaningful controversy for an extended period, that is reason enough to conclude that it does not pose a meaningful threat of religious establishment.

B. The Peace Cross Is Constitutional.

Both of those approaches easily resolve this case. For 93 years, the Peace Cross has stood as a monument to the residents of Prince George's County who perished in World War I. Every conceivable contex-

tual consideration confirms that the government's purpose in maintaining the monument and its objective meaning are secular. And the Peace Cross fits within an unbroken, centuries-old history of using the cross as an official symbol of sacrifice and martial valor. For each of these reasons, together and independently, the monument complies with the Establishment Clause's strictures.

1. The purpose and objective meaning of the Peace Cross are secular.

The context of the Peace Cross plainly conveys its secular purpose and meaning. The usage of the cross as a symbol of the World War I dead, the inscriptions on the face of the display, the setting in Veterans Memorial Park, and the 93-year history—all make clear that the purpose and objective meaning of this monument are to commemorate war dead and to honor the Nation's veterans. And the passage of time has not only deepened that message, but also given the monument a secondary meaning as a historic landmark.

First, the symbol that the monument employs—the Latin cross—is one that can convey "not simply a religious message, but a secular message as well." *Van Orden*, 545 U.S. at 701 (Breyer, J., concurring in judgment); *see Buono*, 559 U.S. at 721 (plurality). As the plurality explained in *Buono*, when used in the context of a war memorial, "a Latin cross is not merely a reaffirmation of Christian beliefs"; it "evokes *far more* than religion" as "a symbol often used to honor and respect those whose heroic acts, noble contributions, and patient striving help secure an honored place in history for this Nation and its

people." 559 U.S. at 721 (plurality) (emphasis added).

That meaning of the Latin cross as a symbol of commemoration and loss was especially well-established in the immediate aftermath of World War I. Poetry, photographs, visual art, and other monuments across the country used the Latin cross as a universal symbol of the sacrifices of those who fought and died. John McCrae's "In Flanders Fields," the novel *The Four Horsemen of the Apocalypse*, the crosses erected at Arlington National Cemetery and the St. Mihiel American Cemetery, and hundreds of similar Crosses of Sacrifice in Commonwealth countries' World War I cemeteries reflect this well-known meaning. *See supra* pp. 4-9. Congress itself has recognized that meaning in multiple enactments. *See* Consolidated Appropriations Act, 2005, Pub. L. No. 108–447, div. J, tit. I, § 116(a), 118 Stat. 2809, 3346; Department of Defense Appropriations Act, 2002, div. A, tit. VIII, § 8137(a), 115 Stat. at 2278; H.R. Res. 16, 68th Cong., at 1 (1924) (at JA 1163-64).

The Fourth Circuit majority rejected the complex historical and cultural meaning of a cross as a symbol of World War I sacrifice by reducing it to a single meaning. In its view, the Latin cross is "exclusively a Christian symbol," one that "only holds value as a symbol of death and resurrection *because* of its affiliation with the crucifixion of Jesus Christ." Pet. App. 20a-21a (internal quotation marks omitted). That simplistic analysis was mistaken, root and branch. The Fourth Circuit's apparent belief that a symbol with religious associations can never take on secular meanings was not only rejected by this Court

in *Buono* in the specific context of a cross used to commemorate World War I sacrifice, 559 U.S. at 721 (plurality)—it is irreconcilable with this Court's Establishment Clause jurisprudence more broadly. The Court has time and again held that symbols and words that take meaning from religion may also convey secular messages. Indeed, *every* member of the *Van Orden* court recognized that a government display of the Ten Commandments may be a permissible representation of law, even though its meaning as a symbol of law derives entirely from its religious origins. *See supra* pp. 26-27.

That conclusion follows from common sense. Few symbols, least of all the cross, are "exclusively" religious. Pet. App. 20a; *see Summum*, 555 U.S. at 474 ("[t]he meaning conveyed by a monument is generally not a simple one"). The simple shape of the cross has had numerous uses and meanings throughout history: as a crude Roman instrument of execution, as a marker of gravestones, as a sign of sacrifice, as a medal of valor, and as a prominent symbol of Christianity. Cultural context shapes what objects and symbols mean at particular times and places. The use of the cross in our Nation's cultural history makes plain that it holds a significant secular meaning to commemorate valor and sacrifice, especially when associated with the First World War.[10]

---

[10] That is not to suggest that the cross must cease to have any religious meaning to be displayed. *See, e.g.*, *Allegheny*, 492 U.S. at 634 (O'Connor, J., concurring) (a menorah display need not be "devoid of any religious significance" to be permissible). The relevant question under the Establishment Clause is what

Second, the face of the monument and the "circumstances surrounding [its] placement" make plain that the Peace Cross was erected to convey a commemorative message. *Van Orden*, 545 U.S. at 701 (Breyer, J., concurring in judgment); *see Buono*, 559 U.S. at 715 (plurality). A plaque at the base of the Peace Cross dedicates the monument to "the heroes of Prince George's County Maryland who lost their lives in the Great War for the liberty of the world" and lists the names of the 49 local men who fell. Pet. App. 55a; *cf. Allegheny*, 492 U.S. at 619 (opinion of Blackmun, J.) (relying on display's "explanatory plaque"). An inscription on the face of the monument enshrines President Wilson's statement that "[t]he right is more precious than peace." Pet. App. 44a. Each face of the monument honors a universal civic value: "valor; endurance; courage; devotion." Pet. App. 55a. These inscriptions speak with a single consistent voice, one wholly without religious content: They mark the cross as a symbol of respect for the war dead and the cause for which they died.

The circumstances surrounding the placement of the Cross reaffirm that it was erected to convey this meaning. The organizers of the monument were a group of bereaved mothers and private citizens whose avowed purpose was to commemorate those "who gave their all in the World War to make the world safe for democracy." *Id.* The ground for the

---

message the *government* sends by displaying or maintaining that symbol. It may utilize the idioms of religious traditions to convey a secular message—such as war commemoration—even if some observers may still draw religious significance from them. *See Town of Greece*, 572 U.S. at 582-583.

monument was broken by the mother of the first soldier from Prince George's County to die in the war, and another mother of a soldier memorialized by the cross soon after wrote: "I feel that our memorial cross is, in a way, his grave stone." JA 989; *see also* JA 937 & n.11. When construction of the cross stalled in 1922, the American Legion—a civic veterans service organization chartered by Congress, Pet. App. 39a—assumed responsibility for the land and completed the monument. Pet. App. 57a–58a; JA 906, 910-911.

These "[p]rivate citizens" erected the cross "to commemorate American servicemen who had died in World War I," not to convey a Christian message. *Buono*, 559 U.S. at 715 (plurality). It is true that one private fundraising document and a speaker at the groundbreaking ceremony made brief allusions to religion. *See* Pet. App. 6a-7a, 55a-56a. But these religious references—hardly uncommon at the time—were dramatically outnumbered by the contemporaneous statements describing the cross and its purposes in exclusively secular terms. *See, e.g.*, Pet. App. 56a-57a; *cf. Van Orden*, 545 U.S. at 701 (Breyer, J., concurring in judgment) (noting that the private organization that donated the monument was "interested in the religious aspect of the Ten Commandments" but had a "primarily secular" objective).

Furthermore, when the Commission assumed ownership of the monument in 1960, the civic goals of those who erected the cross retained central prominence. The center of the cross prominently bears the symbol of the American Legion. *See* JA 929-931; *cf. Van Orden*, 454 U.S. at 701–702 (Breyer, J., concur-

ring in judgment) (monument "prominently acknowledge[s] that [a private organization] donated the display"); *Buono*, 559 U.S. at 715, 722 (plurality) (monument bears symbol of Veterans of Foreign Wars). And in the instruments relinquishing any remaining property interest it had in the monument, the American Legion expressed that it reserved the right to use the monument in perpetuity for commemorative events, as it has in fact done for decades. JA 1384-87; *see also* Pet. App. 60a.

Third, the "physical setting of the monument" reinforces its meaning as a secular war memorial. *Van Orden*, 545 U.S. at 702 (Breyer, J., concurring in judgment). Since the Peace Cross was erected, the community has surrounded it with other monuments to those who fell in our Nation's conflicts, in an area now known as Veterans Memorial Park. Pet. App. 60a, 102a. In 1944, local American Legion posts erected a stone scroll across the street from the Peace Cross to honor individuals who died in World War II. Pet. App. 60a. In 1983, a monument was added to honor veterans of the Korean and Vietnam Wars. Pet. App. 60a-61a. Other monuments in the park commemorate the victims of the attack on Pearl Harbor, individuals who died on September 11, 2001, and American forces that defended the Nation's capital in the Battle of Bladensburg during the War of 1812. Pet. App. 60a–61a, 102a. As the Court has repeatedly observed, the addition of nearby monuments bearing a consistent theme strongly communicates what message the government wishes a monument to convey. *See Van Orden*, 545 U.S. at 701 (Breyer, J., concurring in judgment); *see also Summum*, 555 U.S. at 477; *Allegheny*, 492 U.S. at 614 (opinion of Blackmun, J.); *Lynch*, 465 U.S. at 692

(O'Connor, J., concurring). Here, that message is one of patriotic commemoration and respect for the fallen.

Other features of the monument's physical setting confirm that commemorative message. An American flag flies immediately adjacent to the monument. A nearby "[t]rail marker" constructed by the National Park Service describes the monument as "a place for communities to commemorate the residents in service and in death." JA 902. Furthermore, the area surrounding the monument—a busy highway median—conveys "little or nothing of the sacred" and "does not readily lend itself to * * * religious activity." *Van Orden*, 545 U.S. at 702 (Breyer, J., concurring in judgment). And the monument is not located in a sensitive place, like a school or a civic building, in which Establishment Clause concerns are at their peak. *See Town of Greece*, 572 U.S. at 590 (plurality); *Van Orden*, 545 U.S. at 703 (Breyer, J., concurring in judgment); *id.* at 690-691 (plurality).

The Fourth Circuit deemed it significant that the Peace Cross is "the most prominent monument in the area." Pet. App. 24a. But the size of the memorial simply conveys *how* the builders wished the cross's message conveyed—that is, prominently—not what the message actually is. *Cf. Davenport*, 637 F.3d at 1106 (Kelly, J., dissenting from denial of petition for rehearing) (large size of memorial merely ensured observers would "take notice of the display and absorb its message"). Furthermore, the size of the monument is in part just a function of the fact that, when erected, the Peace Cross marked the terminus of a lengthy new road connecting Bladensburg to

Annapolis, whereas the surrounding area has developed substantially since then. *See* JA 431, 433.

Fourth, "[t]ime also has played its role" in confirming the secular meaning of the Peace Cross. *Buono*, 559 U.S. at 716 (plurality); *see Van Orden*, 545 U.S. at 702-703 (Breyer, J., concurring in judgment). The Peace Cross was erected in 1925. In the 93 years that have passed since, the Peace Cross has been used regularly and consistently as a site for mourning and honoring the Nation's veterans. *Cf. Buono*, 559 U.S. at 716 (plurality). Year in and year out since the monument's construction, the community has held annual Veterans Day and Memorial Day events at the site and the neighboring war memorials. Pet. App. 61a-62a; *see e.g.*, JA 235-273, 541-612. Apart from a single newspaper advertisement in 1931, there is no evidence the cross has ever been used as a site of a religious service of any kind. Pet. App. 62a.[11] Throughout its long history, "the cross and the cause it commemorate[s]" have "become entwined in the public consciousness." *Buono*, 559 U.S. at 716 (plurality).

The Peace Cross has also acquired a secondary meaning during this period: as a historic landmark and symbol of the local community. The Peace Cross records for history the way that members of the community responded to a traumatic event in the life

---

[11] The Fourth Circuit's suggestion that the benedictions and invocations at veterans services amount to "group prayers" was incorrect. The Court has made clear that non-proselytizing prayers of this nature—which have long been common at veterans' events throughout the country—are compatible with the Establishment Clause. *See Town of Greece*, 572 U.S. at 581.

of the Nation. *See* JA 988-991. It conveys the meaning individuals drew from World War I, the values they thought the war represented, and the way they wished to honor those they lost. JA 216-217, 937-938, 988-991, 1127, 1143. It is a snapshot of a moment in time and an enduring link with the past. *See* Pet. App. 99a-100a (Wilkinson, J., dissenting from denial of rehearing en banc); *cf. Am. Atheists, Inc.* v. *Port Auth. of N.Y. & N.J.*, 760 F.3d 227, 241 (2d Cir. 2014).

Over time, the Peace Cross has also become an architecturally and aesthetically significant monument. It was designed and constructed by the sculptor John Joseph Earley, an innovator in concrete and an early figure in the Art Deco movement. *See* JA 906, 909; *see generally* Lori Renée Aument, Experimentation in Concrete: John J. Earley at Meridian Hill Park, Washington, DC: History, Technology, and Characterization of Exposed Aggregate Concrete (1999) (unpublished M.S. thesis, University of Pennsylvania).[12] The Peace Cross is "an early example" of Earley's use of concrete, previously considered a utilitarian construction material, to create a colorful and visually striking work of art. JA 906. It reflects a nationwide turning point in how war memorials were built, breaking with the traditional style of using sculptural representations of a single person, in order to "democratize war memorials" by using a symbolic representation of the community at large. JA 912; *see also* JA 958.

---

[12] *Available at* https://repository.upenn.edu/cgi/viewcontent.cgi?article=1348&context=hp_theses.

Both the local and the federal government have recognized the monument's historic significance. The National Park Service placed the Peace Cross on the National Register of Historic Places in 2015, and Prince George's County has protected the Cross through local historic preservation laws since 2010. JA 1599-1601; *see also* JA 969-985. When the Commission acquired the monument over 50 years ago, its principal aim was to preserve the monument in perpetuity as a landmark; since then it has repeatedly engaged in preservation efforts designed to reflect and preserve its historic value. *See, e.g.*, JA 308, 418, 906-907, 1387.

By retaining the monument after 93 years, then, the Commission conveys not only a message of respect for the fallen; it conveys a respect for history. No interpretation of the Establishment Clause "require[s] governments to hide works of art or historic memorabilia from public view" or tear down a monument, like this one, that has "become an important feature of a familiar landscape or a reminder of an important event in the history of a community." *Van Orden*, 545 U.S. at 711 (Stevens, J., dissenting). Otherwise the federal government would be required to divest ownership or cease financial support of numerous structures and artistic works it has long been responsible for preserving.[13]

---

[13] *See, e.g.*, Authority of the Department of the Interior to Provide Historic Preservation Grants to Historic Religious Properties Such as the Old North Church, 27 Op. O.L.C. 91 (2003) (Park Service grant to preserve still-active Old North Church in Boston); *Martin Luther King Jr. National Historic Park: Ebenezer Baptist Church*, Nat'l Park Serv.,

A final aspect of the monument's history is "determinative." *Id.* at 702 (Breyer, J., concurring in judgment). From the date the Peace Cross was first conceived in 1919 until this suit began, almost a century passed in which "the presence of this monument * * * went unchallenged." *Id.*; *see Buono*, 559 U.S. at 716 (plurality). Throughout that period, thousands passed the monument, including respondents. *See* JA 29-30, 666. But until the present dispute, there is no record that any person ever raised any concern that the monument improperly favored religion, described it as a representation of Christianity, or challenged it as establishing a religion. That time period, more than twice as long as the period in *Van Orden*, "suggest[s] more strongly than can any set of formulaic tests that few individuals, whatever their system of beliefs, are likely to have understood the monument as amounting * * * to a government effort to favor a particular religious sect." 545 U.S. at 702 (Breyer, J., concurring in judgment).

2. *The Peace Cross fits in a long history and tradition of displaying crosses as symbols of sacrifice and military valor.*

History and tradition independently support the conclusion that the Peace Cross is constitutional. As the Court explained in *Town of Greece*, where history shows that "the specific practice" being challenged has "withstood the critical scrutiny of time and

---

https://www.nps.gov/malu/planyourvisit/ebenezer_baptist_church.htm (last visited Dec. 16, 2018) (National Park Service maintenance of church where Martin Luther King, Jr. was baptized and began preaching).

political change," the Court rarely need look further to confirm that it complies with the Establishment Clause's call for religious neutrality. 572 U.S. at 577. For more than 200 years, crosses have been used as symbols of sacrifice and military valor, and similar monuments have dotted the Nation's landscape since before its Founding. This monument fits well within that tradition and is thus constitutional on that basis alone.

When European settlers arrived in North America, they brought with them the European tradition of using the cross as a "symbol of sacrifice" and an "emblem for valor and bravery." *See* George Willard Benson, The Cross: Its History and Symbolism 57 (1934). From the beginning, the North American settlers and colonists used crosses to commemorate difficult episodes. In April 1607, the Jamestown colonists who landed in what would become the first permanent English settlement in America erected a wooden Latin cross to give thanks for a successful crossing.[14] In 1688, Father Pierre Millet erected a cross at Fort Niagara, in what would become Youngstown, New York, to honor the men who manned the fort during a punishing winter when 88 starved to death.[15] In 1785, the Acadians, a group of

---

[14] S. J. Res. 243, 75th Cong. (1938); *Cape Henry Memorial: The beginning and end of British America has roots on these windswept sands*, Nat'l Park Serv., https://www.nps.gov/came/index.htm (last visited Dec. 16, 2018).

[15] Thor Borresen, *Father Millet Cross: America's Smallest National Monument*, 3 Regional Rev. 1 (1939), *available at* https://web.archive.org/web/20080726175911/http://www.nps.gov/history/history/online_books/regional_review/vol3-1e.htm.

French-Canadian settlers who had been displaced by British Loyalists resettling in Canada, erected a cross to give thanks when they arrived safely in modern-day Maine.[16]

Americans continued to use the symbol of the cross during and after the Nation's Founding. The first flag of the United States, the Grand Union Flag, which George Washington raised on Prospect Hill during the siege of Boston, included a cross. *See* Michael Corcoran, For Which It Stands, An Anecdotal Biography of the American Flag 27-28, 33-34 (2002). In the Civil War, the Union Army used crosses to identify various corps and to commemorate their losses.[17] When soldiers from those corps died, the memorials erected to honor them often included the crosses of their corps. *See, e.g.*, Tom Huntington, Guide to Gettysburg Battlefield Monuments 19, 47, 68, 78, 114, 118 (2013). All told, at least 114 such Civil War monuments were erected that bore a cross, including the 142nd Pennsylvania Infantry Monument and the Irish Brigade Monument at Gettysburg. *See id.* at 86, 129; *Trunk* v. *City of San Diego*, 660 F.3d 1091, 1099–100 (9th Cir. 2011) (Bea, J., dissenting from denial of rehearing en banc).

---

[16] *See National Register of Historic Places Inventory-Nomination Form: Acadian Landing Site-St. John Valley, 1785*, Nat'l Park Serv. (Sept. 20, 1973), https://npgallery.nps.gov/NRHP/GetAsset/NRHP/73000098_text.

[17] The 5th and 6th Corps of the Union Army both employed cross symbols. *See* Frank C. Foster, United States Army Medals, Badges and Insignias 9 (2011).

In the late nineteenth and early twentieth centuries, the use of crosses to honor the contributions of American servicemen and to memorialize the dead became increasingly widespread. In 1890, the Naval Academy Cemetery erected a Latin cross in honor of sailors who died during an Arctic expedition of 1881. *Kondrat'yev* v. *City of Pensacola*, 903 F.3d 1169, 1181 (11th Cir. 2018) (Newsom, J., concurring in judgment), *petition for cert. docketed*, No. 18-351 (U.S. Sept. 18, 2018). In 1901, women in Georgia erected a memorial cross to mark the site of Fort Augusta, an American stronghold during the French and Indian War and later the site of a key battle of the American Revolution. Edith Hamilton Daly, 14 J. of the Am. Irish Historical Society 196 (1915). And in the wake of World War I, the cross became the central symbol of wartime sacrifice and loss, and cross memorials proliferated in communities and cemeteries across the United States. *See supra* pp. 6-9.

Throughout the twentieth century and up to the present day, American communities have continued to honor the collective sacrifices of the war dead by erecting memorial crosses. In 1926, a wooden cross was erected in Yorktown, Virginia to commemorate French soldiers who died in the last battle of the Revolutionary War. Marcel Villanueva, The French Contribution to the Founding of the United States 120 (1975). The people of Woonsocket, Rhode Island erected a cross to honor locals who died in World Wars I and II.[18] The town of Rochester, New York

---

[18] *See* Press Release, Rhode Island Office of Att'y Gen., *AG Kilmartin Applauds Woonsocket for Actions to Defend the WWI*

erected a cross to commemorate residents who fought and fell in World War I, World War II, Korea, and Vietnam.[19] In 2004, marines in California erected unadorned, wooden crosses to honor friends lost in the war on terror.[20] Across the country, many communities hold "white cross ceremonies" where they erect unadorned white crosses to honor fallen veterans.[21]

Furthermore, Congress has expressly recognized and honored the use of crosses as secular symbols to commemorate the Nation's fallen. It repeatedly gave recognition to the cross as a symbol of World War I, including by authorizing multiple medals for valor in

---

& WWII Monument (May 2, 2012), *available at* https://www.ri.gov/press/view/16435.

[19] *See East Rochester's Forever Young Memorial*, Nat'l War Mem'l Registry, https://www.nationalwarmemorialregistry.org/joomla/war-memorial-registry-search/new-york/east-rochester-s-forever-young-memorial (last visited Dec. 16, 2018).

[20] *See* Gretel C. Kovach, *Marines Hike Memorial Hill*, San Diego Union-Trib. (July 19, 2014, 2:47 PM), https://www.sandiegouniontribune.com/military/sdut-marines-hill-memorial-cross-matthew-abbate-2014jul19-story.html.

[21] *See, e.g.*, Julia Sarcinelli, *Fitchburg's White Cross Ceremony honors fallen heroes*, Sentinel & Enterprise News (May 28, 2018, 7:02 AM), http://www.sentinelandenterprise.com/news/ci_31906752/fitchburgs-white-cross-ceremony-honors-fallen-heroes (Fitchburg, Massachusetts); Douglas White, *'It puts a lump in your throat' Memorial crosses going up in Central Park*, The Gleaner (May 11, 2017, 3:37 PM), https://www.thegleaner.com/story/news/2017/05/11/puts-lump-your-throat-memorial-crosses-going-up-central-park/101427194/ (Henderson, Kentucky).

the shape of crosses and approving of the continued use of cross-shaped grave markers in Europe to replace the temporary wooden crosses. *See supra* pp. 5-6. In recent decades, it has enacted multiple statutes recognizing and seeking to preserve cross memorials as national monuments to the war dead. *See* Preservation of Mt. Soledad Veterans Memorial, Pub. L. No. 109-272, 120 Stat. 770 (2006); Department of Defense Appropriations Act, 2002, div. A, tit. VIII, § 8137(a), 115 Stat. at 2278; Consolidated Appropriations Act, 2005, div. J, tit. I, § 116(a), 118 Stat. at 3346.

The Establishment Clause should be interpreted and applied in light of this longstanding tradition. Memorial crosses have been erected since long before the Nation's Founding, and have continued to be built and maintained up to the present. That history makes it unlikely that those who drafted the First Amendment thought that this custom could not "coexist[ ] with the principles of disestablishment and religious freedom." *Marsh*, 463 U.S. at 786. And the enduring use of the Latin cross in countless government practices since then—in military medals, monuments to the war dead, local veterans ceremonies, and federal statutes—suggests that, as this country's religious diversity has grown, the use of the cross as a symbol of sacrifice has not become seen as a means of aligning the government with one faith or endorsing a particular creed. *See Town of Greece*, 572 U.S. at 578.

Indeed, the tradition of using crosses as symbols of commemoration is at least as venerable as the traditions on which this Court's precedents have previously relied. In *Town of Greece*, the Court noted that

the tradition of state legislative prayer considered in *Marsh* had "persisted" "for more than a century," and it found that local legislative prayer "has historical precedent" by citing a pair of examples from 1909 and 1910. *Id.* at 576. In *Van Orden*, the plurality identified the "role played by the Ten Commandments in our Nation's heritage" by looking to a handful of examples, including ones dating from 1897 and 1935. 545 U.S. at 688-689 (plurality). The tradition of using crosses as commemorative symbols is far longer: It dates to well before the Founding and has been widespread at least since the Civil War.

The Peace Cross fits easily within this tradition. *See Town of Greece*, 572 U.S. at 577. Like the crosses at Cape Henry and Yorktown, it was erected in the simple shape of a cross, and seeks to commemorate noble achievements and heroic sacrifices. No aspect of this monument "proselytize[s]," "threaten[s] damnation," or "denigrate[s] nonbelievers." *Id.* at 583-584. On the contrary, the Peace Cross contains conspicuously more indicia of its universal message than many of the Nation's most cherished cross monuments, including the simple crosses at Arlington and the "unadorned cross" on Sunrise Rock that Congress enacted a statute to save.

* * *

The two approaches the Court has widely agreed on as bases for affirming a monument's constitutionality thus lead decisively to the same conclusion here: The purpose and objective meaning of the Peace Cross are plainly secular, and the Cross fits within a long history and tradition of using crosses to commemorate loss and signify martial valor. That is

enough to conclude that it complies with the Establishment Clause twice over.

Indeed, *Van Orden* and *Buono* all but dictate that conclusion. Every consideration on which Justice Breyer relied in finding the Ten Commandments monument constitutional in *Van Orden* is present here: the use of a religious symbol that also bears a "secular" and "historical" meaning; the erection of the monument by a civic group to convey an ethical message; the location of the monument in a park dedicated to a common secular theme; and the decades that the display has stood without challenge. 545 U.S. at 701-702 (Breyer, J., concurring in judgment); *see* Pet. App. 104a-105a (Niemeyer, J., dissenting from denial of rehearing en banc). In nearly every respect, this is an *a fortiori* case. The Peace Cross, unlike the Texas monument, includes multiple express declarations of its secular purpose on its face, has been supported by 93 years of unbroken practice, and does not contain text explicitly "invoking * * * the Deity" or prescribing principles of religious observance. *Van Orden*, 545 U.S. at 700-703 (Breyer, J., concurring in judgment).

The message conveyed by this monument is also more clearly secular than the one at issue in *Buono*. The war memorial under review there was a "bare, unadorned cross" "at an isolated location in the desert" that had sometimes been used for Easter services, *Buono*, 559 U.S. at 759 (Stevens, J., dissenting), but the plurality nonetheless found that lower courts erred in assigning it a predominantly religious meaning, *id.* at 715-716 (plurality). It follows that the same is true here, given the numerous indicia of the monument's secular meaning and the absence of

virtually any record of religious practice. Indeed, even the dissenters in *Buono* suggested that a monument just like this one—a cross used as part of a "more elaborate" memorial—could pass muster. *Id.* at 747 n.7 (Stevens, J., dissenting).

Concluding that the Peace Cross is unconstitutional, by contrast, would provoke "the very kind of religiously based divisiveness that the Establishment Clause seeks to avoid." *Van Orden*, 545 U.S. at 704 (Breyer, J., concurring in judgment). It would require the disfigurement or removal of a monument that has honored the war dead and served as a place of civic unity for nearly a century. That destructive act would inevitably be interpreted as a sign of shocking disrespect for the brave souls whom the memorial commemorates, and for the thousands of veterans whom it has been used for decades to celebrate. It would be seen by many not as a sign of a government committed to religious neutrality, but of one "bent on eliminating from all public places * * * any trace of our country's religious heritage." *Buono*, 559 U.S. at 726 (Alito, J., concurring in part and concurring in judgment).

What is more, the removal of the Peace Cross would inevitably require the destruction of other cross-shaped memorials throughout the country. If the Peace Cross must fall, despite being marked with numerous indications of its secular meaning, then the far simpler crosses in nearby Arlington National Cemetery cannot survive. Nor can the hundreds of other war memorials that have long stood at Gettysburg, Cape Henry, Acadia Landing, and elsewhere. Affirming the invalidation of the Peace Cross would "encourage disputes concerning the removal of

longstanding [memorials] * * * across the Nation," and compel the elimination of a national commemorative tradition. *Van Orden*, 545 U.S. at 705 (Breyer, J., concurring in judgment).

The Fourth Circuit itself recognized this risk but reserved the question whether the crosses in Arlington, at least, would meet destruction. Pet. App. 29a. It suggested that those memorials could potentially be distinguished because they are smaller, they appear in "a designated area for commemorating and memorializing veterans," and Arlington uses diverse religious symbols for its individual grave markers. *Id.* Those distinctions are empty. The Argonne Cross and Canadian Cross of Sacrifice are between 13 and 24 feet high, substantially "talle[r]" than the surrounding monuments. Pet. App. 24a. Veterans Memorial Park serves the same role for Prince George's County as a place for "commemorating and memorializing veterans" as Arlington National Cemetery does for the Nation. And the notion that *more* religious symbolism would have saved the Peace Cross from invalidity under the Establishment Clause is absurd. If anything, the addition of overtly sectarian monuments nearby would have indicated—contrary to fact—that the Peace Cross commemorates Christian veterans alone, sending precisely the sort of divisive message the Establishment Clause disfavors.

The Peace Cross, and numerous monuments like it, fit comfortably within the Nation's traditions and our Constitution's commitment to religious neutrality. The Court should "let the cross remain and let those honored rest in peace." Pet. App. 100a (Wilkinson, J., dissenting from denial of rehearing en banc).

C. The Peace Cross Is Also Constitutional Under The *Lemon* Test.

The Court need go no further to uphold the Peace Cross. Although the Fourth Circuit "s[aw] fit to apply *Lemon*" in analyzing the monument, Pet. App. 17a, this Court has long explained that *Lemon* provides at most "useful" guideposts in evaluating passive displays. *Lynch*, 465 U.S. at 679. In *Van Orden*, a majority of the Court expressly declined to apply *Lemon* to the Ten Commandments display at issue. *See Van Orden*, 545 U.S. at 685-686 (plurality); *id.* at 700 (Breyer, J., concurring in judgment). And other cases have similarly declined to apply *Lemon* where a more straightforward analysis dictated the result. *See Lynch*, 465 U.S. at 679 (giving examples). Where, as here, the uncontested principles of the Court's Establishment Clause precedents are sufficient to resolve the case, there is no need for courts to employ *Lemon*'s "formal * * * test[ ]." *Van Orden*, 545 U.S. at 703 (Breyer, J., concurring in judgment). Nor is there a need for the Court to decide "the fate of the *Lemon* test in the larger scheme of Establishment Clause jurisprudence." *Id.* at 686 (plurality).

Nonetheless, the same result would obtain under the *Lemon* test. That test provides that a challenged government action is constitutional if it (1) "ha[s] a secular purpose"; (2) "neither advance[s] nor inhibit[s] religion in its principal or primary effect"; and (3) does not "foster an excessive entanglement with religion." *Allegheny*, 492 U.S. at 592 (citing *Lemon*, 403 U.S. at 612-613). The Peace Cross easily surmounts each of those hurdles.

1. The Fourth Circuit acknowledged that "[t]he Commission has articulated legitimate secular purposes for displaying and maintaining the Cross." Pet. App. 19a. Rightly so. The record makes plain that the Commission acquired the Peace Cross to assure traffic safety and preserve the monument. *Id.*; *see* JA 1534-35. And over the course of decades, the Commission has maintained the monument for the purpose of honoring the soldiers who perished in World War I and preserving this historic landmark. Pet. App. 19a; *see* JA 418, 906-907, 1384-87. These purposes are both plainly legitimate and wholly secular.

2. The Peace Cross also does not have the "effect" of endorsing religion. As the Court has explained, *Lemon*'s "effect" prong asks whether a "reasonable observer" who is "familiar with the full history and context" of the challenged display would perceive it as an "endorsement" of religion. *Zelman* v. *Simmons-Harris*, 536 U.S. 639, 655 (2002). Critically, this prong "do[es] not ask whether there is *any* person who could find an endorsement of religion, whether *some* people might be offended by the display, or whether *some* reasonable person *might* think [the State] endorses religion." *Pinette*, 515 U.S. at 779-780 (O'Connor, J., concurring in part and concurring in judgment) (emphases and alterations in original; citation omitted). Rather, it seeks to determine "the 'objective' meaning" of the display, by asking whether "a personification of a community ideal of reasonable behavior"—someone who is "aware of the history and context of the community," and whose knowledge is not "limited to the information gleaned simply from viewing the challenged display"—would "perceive a governmental endorse-

ment" of religion. *Id.* (quoting *Lynch*, 465 U.S. at 690 (O'Connor, J., concurring); W. Keeton et al., Prosser and Keeton on Law of Torts 175 (5th ed. 1984)); *see Buono*, 559 U.S. at 721 (plurality) (endorsement test "requires the hypothetical construct of an objective observer who knows all of the pertinent facts and circumstances surrounding" a display).

For many of the reasons already given, a reasonable observer would not understand the Peace Cross to endorse any religion. A reasonable observer viewing the Peace Cross would be aware of the long history of using crosses as symbols of the World War I dead, and as symbols of sacrifice and military valor generally. *See Town of Greece*, 572 U.S. at 587 (plurality) ("[i]t is presumed that the reasonable observer is acquainted with th[e] tradition" of using legislative prayer as "part of our expressive idiom"). She would know the full content of the monument, including the dedication to the 49 men who perished, the quotation from President Wilson, the Legion symbol, and the inscriptions honoring "valor; endurance; courage; devotion." She would know that the monument was erected by the bereaved mothers of servicemen who perished in World War I and by the American Legion, and that for nine decades it has been used almost exclusively as a site for patriotic commemorative ceremonies. *Zelman*, 536 U.S. at 655 (reasonable observer aware of "full history" of display). And she would know that the Cross stands at the center of Veterans Memorial Park, surrounded by other secular memorials to the fallen of the Nation's conflicts. *See Lynch*, 465 U.S. at 692 (O'Connor, J., concurring) ("setting changes what

viewers may fairly understand to be the purpose of the display").

Considering the monument in light of its "full history and context," the reasonable observer would thus conclude that the Peace Cross is—as it says—a memorial to the men who perished in World War I, not a statement of support for any particular religion. *Zelman*, 536 U.S. at 655. To be sure, the Peace Cross bears the shape of a religious symbol. But a reasonable observer, "fully aware of our national history and the origins of" the cross as a symbol of the World War I dead, would understand that the Peace Cross "employ[s] th[at] idiom for * * * secular purposes"—to "encourag[e] the recognition of what is worthy of appreciation in society" and to honor those who made the ultimate sacrifice. *Newdow*, 542 U.S. at 36 (O'Connor, J., concurring in judgment) (quoting *Lynch*, 465 U.S. at 692-693). And she would recognize that, after 93 years, the Commission also maintains the memorial in part to preserve a historic landmark, not to preach any part of Christian doctrine.

The Fourth Circuit reached a different conclusion only by severely misapplying the reasonable observer test. The panel reasoned that it could ignore several secularizing features of the monument and its setting—including the "plaque," the "Legion symbol," and the "surrounding monuments"—because "the Cross is located in a high-traffic area" in which "one could not easily park," because "passers-by" might fail to stop and examine the monument in its entirety, and because (after 93 years) some of those features are "weathered." Pet. App. 25a-26a. That is not how the reasonable observer test works. It

emphatically does not turn on the perceptions of "passersby" with a limited "degree[] of knowledge." *Pinette*, 515 U.S. at 779 (O'Connor, J., concurring in part and concurring in judgment); *see Buono*, 559 U.S. at 720-721 (plurality). It looks through the eyes of a "community ideal of reasonable[ness]," *Pinette*, 515 U.S. at 779-780 (O'Connor, J., concurring in part and concurring in judgment), someone who is aware of everything from the history of the Nation to the "legislative history" of a law under challenge, *Santa Fe Indep. Sch. Dist.* v. *Doe*, 530 U.S. 290, 308 (2000). That observer would not be stymied by the lack of parking and the height of the bushes.

3. Finally, the Peace Cross plainly does not "entangle" the government with religion. The concept of "entanglement" refers to a "comprehensive, discriminating, and continuing state surveillance" of religious activities. *Mueller* v. *Allen*, 463 U.S. 388, 403 (1983) (quoting *Lemon*, 403 U.S. at 619). The Commission's upkeep of the Peace Cross does not involve "surveill[ing]" religion at all, let alone "comprehensive[ly]" and "continu[ously]" doing so. The Fourth Circuit's holding to the contrary rested entirely on its view that the Peace Cross was being maintained as a Christian symbol. Pet. App. 30a-31a. But, for the reasons already given, that premise is incorrect, and the Fourth Circuit's entanglement analysis accordingly crumbles with it.

CONCLUSION

For the foregoing reasons, the judgment of the Fourth Circuit should be reversed.

Respectfully submitted,

ADRIAN R. GARDNER
WILLIAM C. DICKERSON
TRACEY A. HARVIN
MARYLAND-NATIONAL CAPITAL PARK AND PLANNING COMMISSION
6611 Kenilworth Ave., Suite 200
Riverdale, MD 20737

NEAL KUMAR KATYAL
Counsel of Record
MITCHELL P. REICH
BENJAMIN A. FIELD
HOGAN LOVELLS US LLP
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5600
neal.katyal@hoganlovells.com

Counsel for Petitioner Maryland-National Capital Park and Planning Commission

DECEMBER 2018